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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Implementation of Section 304 of the
Telecommunications Act of 1996

Commercial Availability of Navigation Devices

CC Docket No. 97-80

REPLY COMMENTS OF PACIFIC BELL VIDEO SERVICES

I. **INTRODUCTION**

Pacific Bell Video Services, a subsidiary of SBC Communications Inc., hereby replies to comments on the Commission's proposed rules to implement Section 629 of the Communications Act requiring the commercial availability of navigation devices.

In these reply comments, we make the following points:

- The record supports our recommendation that the Commission should not apply its navigational devices rules to analog systems.
- The marketplace, the industry and knowledgeable standard setting bodies, not the Commission, should set voluntary standards to promote the commercial availability of equipment.

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- The Commission should not adopt rules that compromise the security of systems or that eliminate choice in the video marketplace that results from unique “look and feel” elements.
- The existence of a single source that makes navigational devices available to consumers with a reasonable amount of effort and expense meets the requirement of Section 629 requirements.
- Navigational devices can be made available without forcing parties to license their proprietary technologies.

II. THE RULES SHOULD NOT APPLY TO ANALOG SYSTEMS

Our Comments advised the Commission not to apply the proposed rules to analog systems, which will be surpassed by digital TV. A substantial number of other commenters across the video industry share that opinion. Multichannel video program distributors (“MVPDs”), programmers, transport providers and equipment manufacturers agree that the Commission’s focus should be on digital systems.¹ Analog systems present significant security concerns. Because the industry consensus is that digital systems will replace analog systems, the efforts of the Commission and industry standard setting bodies would be better directed toward the solution of digital systems security issues.

¹ Gateway 2000, p. 3; GTE, pp. 5-6; US West, pp. 2, 3, 4; NCTA, pp. 8-14; Viacom, pp. i, 3-4; Scientific-Atlantic, pp. 12-13; Ad Hoc Computer and High-Technology Coalition, p. 3; Ameritech, pp. 8-10; General Instrument Corp., pp. 38-46; Echelon Corp., pp. 15, 39, 47; Zenith, pp. 4, 13.

III. THE RULES MUST NOT HAMPER INDUSTRY EFFORTS TO DEVELOP SECURITY MEASURES

The Commission's appreciation of the importance of maintaining system security is clear from the NPRM. Comments in response also demonstrate almost universal recognition that security is a critical issue for MVPDs and that any rule must allow control by the MVPD. In order to provide for security, the security function will most likely have to be separated from other components. The Commission should not adopt rules that would hamper industry efforts to develop security measures.

IV. THE MARKETPLACE SHOULD SET VOLUNTARY STANDARDS BASED ON THE MARKET'S DIRECTION

The record shows that commenters agree with the Commission's preference to leave standard setting to the marketplace and to private, voluntary standards bodies. We continue to advocate that the Commission allow the market to develop interim solutions to customers' needs for navigation devices for systems. Private standards setting efforts will lead to standards that the marketplace determines to be necessary. That is happening today. As GTE points out, standards are currently being developed for digital CPE among like systems and MVPDs. GTE, p. 8.

A. The Marketplace Will Develop Standards for Interoperability and Portability In Response To Market Demand

The Commission's inquiry into the need for standards arises in the context of achieving interoperability and portability, proposed characteristics of commercial availability.

We do not oppose standards that enable interoperability and portability without endangering system security. The Commission, however, should keep in mind that Section 629 does not require either characteristic. Whether interoperability and portability are desirable should be decided by the marketplace. We agree that the marketplace is capable of promoting interoperability on its own. Direct TV, pp. 13-14. The market is better qualified to evaluate the benefits and costs of technical solutions. As the Commission recognizes, the 1996 Act and its legislative history indicate a preference that standards be market driven and that regulation avoid impeding technical innovation. NPRM, para. 4.

B. Knowledgeable Industry Members and Existing Standards Bodies Should Develop Consensus Standards

If the market determines that standards are necessary, existing standard-setting bodies should develop voluntary, consensus based standards. The Commission should not become involved in the standards setting process for several reasons: the expertise currently resides in the private sector as a result of years of research in response to competitive demands. Moreover, establishing technical standards that will affect the availability of equipment and services should not be subject to a regulatory process that is influenced by special interests and political pressures. The Commission should also avoid codifying standards developed by standard-setting bodies. Regulatory lag can only slow technological innovation.

The Commission need not establish new standards bodies. Knowledgeable entities exist that understand the market and the capabilities of the various video distribution systems. Industry standards bodies have and will continue to develop interface standards on a voluntary basis as the marketplace directs.

As the Commission recognizes, the complexity of the video industry involving multiple distribution channels and methods is significantly different from the monopoly telephone industry prior to Carterphone. NPRM, para. 10. Considerations of signal security and potential for harmful interference are paramount and provide just cause to reject the telephone model as a way to accomplish commercial availability for multichannel video programming.

V. THE DEFINITION OF NAVIGATIONAL DEVICES MUST AVOID JEOPARDIZING SYSTEM SECURITY AND REDUCING CONSUMER CHOICE

Commenters have two overriding concerns about how broadly “navigational devices” may be defined. First, definitions that include or affect security devices can jeopardize service and create opportunities for signal theft. Second, requirements for standardization or commercial availability of certain features can eliminate the unique “look and feel” that results in marketplace choice.

The Commission is on firm ground in excluding from its regulations elements that provide system security. Congress did not intend security devices to be commercially available given the specific exclusion of section 629(g). Nor should the Commission attempt to provide for security devices to be widely available by requiring their standardization. We agree that “Any effort to standardize security or require standard interfaces will create more potential for theft.” Scientific-Atlanta, pp. 24-27.

Equipment or features that provide enhanced functionality contribute to the unique “look and feel” that establishes variety, and choice for consumers. Specialized electronic program guides, navigational menus, remote controls and other interactive or custom features will be a significant means for a provider to distinguish itself from the competition. The

Commission should not require the commercial availability of the hardware and software that create the distinctive “look and feel” of a provider’s system.

VI. HAVING EQUIPMENT AVAILABLE TO CONSUMERS AT REASONABLE EFFORT AND EXPENSE FROM A SINGLE NON-AFFILIATED VENDOR MEETS SECTION 629 REQUIREMENTS

The Commission should not establish numerical quotas in defining commercial availability. The marketplace should make decisions about the number of sources and types of distribution system. The Commission can meet its responsibility to promote the availability of navigational devices by enacting regulation that assures that navigational devices are available to consumers with a reasonable amount of effort and expense. General Instrument Corp., p. 15. Requiring multiple manufacturers or vendors is unnecessary and will interfere with the proper operation of the market. Moreover, such regulation will embroil the Commission in unnecessary and uneconomical definitional disputes, for example, about who is eligible as a vendor or as a manufacturer.

VII. THE COMMISSION SHOULD APPLY THE DEFINITION OF AFFILIATE FOUND AT SECTION 3 OF THE COMMUNICATIONS ACT

The Commission should apply the definition of affiliate provided by Section 3 of the Communications Act which defines affiliate in terms of ownership and control. The Commission should reject, however, the suggestion of some commenters that a contractual relationship for the manufacturer or distribution of goods should also establish affiliation. A contract is not sufficient to establish either ownership or control as intended by Section 3. Incidents of ownership generally are not part of a manufacturing or distribution agreement.

Manufacturers may not make goods other than as agreed to by owners; vendors are not free to dispose of owners' goods in ways other than as agreed to by the owners. The extent of ownership and control necessary to establish affiliation is not generally found in contractual agreements.

Moreover, as GTE asserts, exclusive agreements between MVPDs and manufacturers and retailers should not establish affiliation for the purposes of Section 3.

GTE, p. 9. As long as navigational devices are reasonably available to consumers with reasonable effort and expense, Section 629 requirements are met. Whether that occurs through multiple or exclusive agreements is not relevant and should not be part of the Commission's regulations.

VIII. THE COMMISSION SHOULD NOT MANDATE COMPULSORY
LICENSING OF PROPRIETARY TECHNOLOGIES

Some commenters suggest that the Commission needs to ensure that non-owners have access to proprietary technologies in order to guarantee the commercial availability of navigational devices. We disagree. The ramifications of mandatory licensing are severe and will take the Commission unnecessarily on to dangerous grounds. There is no need to abrogate private property rights when industry-established standards and standard interfaces can guarantee technical availability. Mandatory licensing will also blunt incentives to innovate. We agree with Scientific-Atlanta that the Commission should support an open architecture but avoid any requirement for licensing proprietary technology. Scientific-Atlanta, p. 30.

IX. CONCLUSION

The Commission's NPRM evidences a clear understanding of the pitfalls in implementing Section 629. Comments, however, are equally clear about the importance of maintaining system security, in permitting the marketplace to determine the need for standards, and in having established standards-setting bodies develop necessary standards. The Commission should adopt these recommendations which are consistent with and will further the pro-competitive, de-regulatory national policy framework adopted by the 1996 Telecommunications Act.

Respectfully submitted,

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